

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of XOOM)
Energy Ohio, LLC for Certification as a) Case No. 13-1453-EL-CRS
Competitive Retail Generation Provider and)
Power Marketer)

**XOOM ENERGY OHIO, LLC’S MEMORANDUM CONTRA
TO THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL’S MOTION TO
INTERVENE**

I. Introduction

Despite XOOM Energy Ohio, LLC (“XOOM Energy”) holding a certificate from the Public Utilities Commission of Ohio (“Commission” or “PUCO”) and providing competitive retail electric services in Ohio since 2013, the Office of the Ohio Consumers’ Counsel (“OCC”) has moved to intervene in this matter allegedly to “protect consumers from XOOM [Energy], including but not limited to the position that the PUCO should require XOOM [Energy]to change the way it markets electric service and enrolls customers.”¹ OCC, however, does not have the requisite statutory authority to intervene in this certificate renewal proceeding and has not stated any specific interest in the pending application in this matter. It only raises broad industry-wide issues that are not specific to XOOM Energy. Also, and importantly, the Staff represents any interest that OCC might have (but does not), and Staff is capable of representing that alleged interest as it has done for countless certificate renewal proceedings in Ohio for years. OCC will not be harmed if its intervention is denied. Rather, it will be XOOM Energy that is harmed because if OCC is allowed to intervene, OCC will unduly delay this proceeding and prejudice XOOM Energy both through

¹ OCC Motion to Intervene’s Memorandum in Support at 3.

delay and the burden of unnecessary litigation. OCC's failure to address the application that is pending in this case while planning to raise issues that are not related to the pending application should be rejected by the Commission.

II. Standard for Intervention

The standard for intervention at the Commission is set forth in statute and rule. Revised Code Section ("R.C.") 4903.221 states that the Commission shall consider the following factors when deciding a motion to intervene:

- The nature and extent of the prospective intervenor's interest,
- The legal position advanced by the prospective intervenor and its probable relation to the merits of the case,
- Whether intervention by the prospective intervenor will unduly prolong or delay of the proceedings, and
- Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

Ohio Administrative Code ("Ohio Adm.Code") 4901-1-11(A)(2) states that timely intervention shall be permitted if the person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

III. Argument

A. OCC does not have any interest in this proceeding because OCC does not have the statutory authority necessary to intervene.

Even though, generally, intervention may be liberally construed in favor of intervention when a person has a real and substantial interest,² *intervention for OCC cannot be granted* when OCC does not have the statutory authority to appear.³ This is because OCC is a creature of statute and can only act within the express statutory authority that it has been granted.⁴ Without that express statutory authority, OCC does not have a real and substantial interest.

OCC is statutorily authorized to appear at the Commission as a representative of residential consumers under limited and specific circumstances – none of which are this type of proceeding.

Specifically, the OCC may appear at the Commission when:

- An application by a public utility is made to establish, modify, amend, change, increase, or reduce any rate, joint rate, toll, fare, classification, charge, or rental;⁵
- A complaint is filed that a rate, joint rate, fare, toll, charge, classification, or rental for commodities or services rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted by the utility is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law;⁶

² See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 NE.2d 940 (2006), quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 1995 Ohio 269, 656 NE.2d 1277 (1995).

³ *Tongren v. D&L Gas Mktg.* (2002), 149 Ohio App. 3d 508 (citing *Green v. Western Reserve Psych. Hab. Center* [1981], 3 Ohio App.3d 218); and *In the Matter of the Investigation of The East Ohio Gas Company d/b/a Dominion East Ohio Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 12-380-GA-GPS, Entry at ¶ 10 (April 20, 2012). See also R.C. 4911.02, 4911.14, 4911.15, and 4928.16(C).

⁴ *Tongren v. D&L Gas Mktg.* (2002), 149 Ohio App. 3d 508 (citing *Green v. Western Reserve Psych. Hab. Center* [1981], 3 Ohio App.3d 218); and *In the Matter of the Investigation of The East Ohio Gas Company d/b/a Dominion East Ohio Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 12-380-GA-GPS, Entry at ¶ 10 (April 20, 2012).

⁵ R.C. Section 4911.15.

⁶ *Id.*

- OCC files a complaint or appears pursuant to any complaint filed under R.C. 4928.16 (A)(1) or (2) or R.C. 4929.24(A)(1) or (2);⁷
- OCC files under R.C. 4905.26 a complaint for discovery;⁸ and
- OCC files an application for an order compelling compliance if a person fails without lawful excuse to obey a subpoena or to produce relevant matters.⁹

This proceeding does not involve an application by a public utility. This proceeding does not involve a complaint about a utility's rate or service. This proceeding does not involve a complaint filed by OCC. And, this proceeding does not involve an OCC application for a subpoena. Without the requisite statutory authority to participate in a Commission proceeding, OCC cannot participate, nor can it be found, to have a real and substantial interest in this proceeding.

OCC's motion relies on a prior decision from the Supreme Court of Ohio, which held that the Commission had erred in denying OCC's intervention request in prior utility proceedings. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384. That Court decision did not "confirm OCC's right to intervene in PUCO proceedings," as OCC argues in its motion.¹⁰ Nor did the Court in *Ohio Consumers' Counsel* hold that all statutes and rules governing intervention should be generally liberally construed in favor of intervention. Importantly, the Court:

- Confirmed at ¶¶ 15-16 that intervention in Commission proceedings is governed by R.C. 4903.221, which provides that parties may seek to intervene and that the Commission is required to consider the items listed in R.C. 4903.221(B);

⁷ R.C. Sections 4928.16(C)(1) and 4929.24(C)(1).

⁸ R.C. Sections 4928.16(C)(2) and 4929.24(C)(2).

⁹ R.C. Section 4929.15(D).

¹⁰ OCC Motion to Intervene's Memorandum in Support at 4.

- Stated at ¶ 16 that Ohio Adm.Code 4901-1-11, which provides additional guidance, is “very similar to Civ.R. 24 – the rule governing intervention in civil cases in Ohio – which “is generally liberally construed in favor of intervention[]”;
- Stated at ¶ 20 that “[i]n our view, whether or not a hearing is held, intervention ought to be liberally allowed so that the positions of all persons **with a real and substantial interest** in the proceedings can be considered by the PUCO” [emphasis added]; and
- Concluded the Commission erred in denying the appellant’s intervention motions in the two underlying cases (which were public utility accounting-related cases, vastly different cases from this XOOM Energy certification proceeding).

The Court’s holding in *Ohio Consumers’ Counsel* also did not find that the “statutes” or “rules” (including OCC’s enabling statutes) should be liberally construed when determining if OCC should be granted intervention. To the extent OCC argues otherwise, XOOM Energy disagrees that OCC’s statutory powers can be liberally construed. In sum, *Ohio Consumers’ Counsel* is distinguishable and not determinative as to whether OCC has the necessary statutory authority, whether OCC has a real and substantial interest, or whether OCC’s intervention should be granted in this certificate renewal proceeding.

Additionally, to the extent OCC argues on reply that its *unchallenged* intervention in another certification proceeding is applicable precedent or somehow establishes that it has statutory authority to intervene in certification proceedings,¹¹ XOOM Energy strongly disagrees. The Commission did not analyze OCC’s statutory authority nor does the Commission’s decision contain any consideration of the question because it was not put before the Commission. Moreover, that matter involved initial certification, unlike the situation here. OCC, therefore, cannot rely on that case in this proceeding.

¹¹ See *In the Matter of the Application of Suvon, LLC d/b/a FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Finding and Order at ¶ 11 (April 22, 2020).

There is no express statutory authority in R.C. 4911.02, R.C. 4911.14 or R.C. 4911.15 for OCC to intervene in a certificate proceeding. No other statute or rule relied upon by OCC in its motion contains express statutory authority that would give OCC statutory authority to intervene in this proceeding.¹² And, OCC does not have a right to intervene in every Commission proceeding – a point that has been recognized, including by the Commission’s Attorney Examiners.¹³ In sum, OCC does not have the ability to intervene and does not have a real and substantial interest in this proceeding. Its motion to intervene should be denied.

B. OCC does not state any interest in the pending application in this proceeding.

In addition to not being authorized by the General Assembly to intervene in this type of proceeding, OCC also has not stated any valid interest sufficient to allow for its intervention. OCC states in its motion that “Ohio consumers must be protected against fraudulent, misleading, and unfair practices in the marketing of products and services” and a certificate case “is at the core of providing consumer protections to Ohioans.”¹⁴ These two statements may reflect OCC’s aspirational views about consumer protection, but these statements fail to demonstrate that OCC has any specific interest in the issues involved in *this* proceeding. Similarly, OCC’s statement that it wishes to represent residential consumers in this case¹⁵ is only a stated desire; it fails to demonstrate that OCC has any interest in the renewal involved in *this* proceeding.

¹² OCC relies on R.C. 4928.08 and 4928.10, and Ohio Administrative Code 4901:1-21-05(C). Moreover, R.C. 4928.16 also fails to provide authority for intervention in this proceeding.

¹³ *In the Matter of the Investigation of The East Ohio Gas Company d/b/a Dominion East Ohio Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 12-380-GA-GPS, Entry at ¶ 10 (April 20, 2012); and *In the Matter of the Commission’s Investigation into RPA Energy Inc., d/b/a Green Choice Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Noncompliance*, Case No. 21-441-GE-COI, Entry at ¶ 25 (August 12, 2022).

¹⁴ OCC Motion to Intervene at 2.

¹⁵ OCC Motion to Intervene’s Memorandum in Support at 3.

OCC next states that it has moved to intervene in this matter allegedly to “protect consumers from XOOM, including but not limited to the position that the PUCO should require XOOM to change the way it markets electric service and enrolls customers.”¹⁶ The Commission’s rules and Ohio law dictate how XOOM Energy markets its competitive retail electric service and XOOM Energy does so via channels that are not prohibited under Ohio law. Moreover, customers enroll themselves in XOOM Energy’s services through authorized methods for enrolling in competitive retail electric service, with the majority being completed when the customer completes an enrollment application via the Internet, which has been an authorized method for decades and since the start of the competitive market. OCC’s expressed interest is not specific to XOOM Energy, but rather a general issue about suppliers being allowed to market in ways that are not currently disallowed and with customers being permitted to enroll via the Internet. OCC should raise those issues in an appropriate, industry-wide proceeding such as a rulemaking. They are not valid issues to raise in a certificate renewal proceeding and are not valid interests to support intervention in this proceeding.¹⁷

In addition, the timing of OCC’s actions also supports a finding that OCC does not have any interest with the pending application. XOOM Energy’s pending application was filed in May 2022, three months ago. OCC filed nothing in response to the application, which could have been automatically approved in June 2022. Even after that process was suspended, OCC filed nothing in response to the application for two additional months. If OCC actually had an issue with XOOM Energy’s application, it would have sought intervention within 30 days of its filing when the

¹⁶ OCC Motion to Intervene’s Memorandum in Support at 3.

¹⁷ Accord *Ohio Power Company v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS, Entry at ¶¶ 37-38 (January 31, 2022) (OCC intervention denied because its stated interest in ensuring protections for customers and policy positions were not issues in the proceeding and would unnecessarily expand the scope of the proceeding).

application could have been automatically approved. Instead, OCC waited months and months. These facts demonstrate that OCC does not have an interest in the pending application.

Apart from what OCC stated in its intervention motion, it is important to point out what is *not* in OCC's motion. OCC has not stated any interest in any specific part of XOOM Energy's application, which presents its managerial, technical and financial capabilities to continue to provide competitive retail electric services in Ohio – which are the issues in this matter. OCC's motion does not refer to any information in XOOM Energy's pending application. OCC also does not contend that the application is lacking information that is required. Other than referencing that the application was filed and that the automatic approval of the application was suspended,¹⁸ OCC's motion does not mention the application under consideration. That is telling and further supports a denial of OCC's motion to intervene. OCC has not met its burden of showing it has any valid interest in *this proceeding*.

C. Even if OCC has an interest (which it does not), OCC's interest is already represented by Staff.

Any interest OCC has (which it does not) is already represented by Staff. OCC contends that its interest is not represented by others because “it uniquely has been designated as the state representative of the interests of Ohio's residential utility customers.” OCC also claims “[t]hat interest is different from, and not represented by, any other entity in Ohio.”¹⁹ To the contrary, the Commission has found that its Staff represents the interests of utility customers, including

¹⁸ OCC Motion to Intervene at 1; OCC Motion to Intervene's Memorandum in Support at 1.

¹⁹ OCC Motion to Intervene's Memorandum in Support at 4. Although OCC addresses this factor, it “does not concede the lawfulness” of it. Note, OCC is disputing this element of intervention despite it being codified in Ohio Administrative Code 4901-1-11(A)(2) for decades.

residential customers²⁰ and OCC has acknowledged that Staff has a duty to balance the interests of all customer classes, including residential customers.²¹

Staff has considered many applications for initial certificates and for renewed certificates in countless cases before the Commission. Staff, in fact, has done that in this proceeding for many years. There is no reason to believe that the Commission Staff cannot adequately consider XOOM Energy's pending application and adequately represent the interests of the residential customers. In addition, OCC has not explained how any residential customer could be adversely affected if OCC's intervention is denied. Any interest OCC has (which it does not) is represented by Staff. As Staff does regularly, it can make recommendations to the Commission to decide the true issue – whether the certificate should be renewed (which it should). OCC's intervention request should be denied because any interest OCC has is adequately represented by the Staff.

D. OCC's intervention would unduly delay this proceeding and prejudice XOOM Energy.

OCC's intervention in this proceeding will not result in an *expeditious* resolution of the issues. Instead, OCC's participation will unduly delay a resolution because OCC seeks to interject into this proceeding broader issues that OCC either is attempting to litigate or should address in other Commission proceedings (i.e., marketing channels, enrollments through the Internet). XOOM Energy will be forced to incur the expense of unnecessary discovery and litigation advanced by OCC. Indeed, allowing OCC to intervene in this certification proceeding will have a

²⁰See e.g., *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan, etc.*, Case Nos. 16-395-EL-SSO et al., Opinion and Order at ¶ 22 (October 20, 2017) (rejecting claim that no residential customers supported the Amended Stipulation when Staff and others signed the Amended Stipulation); and *In the Matter of the Regulation of the Purchased Gas Adjustment Clause contained within the Rate Schedules of Duke Energy Ohio, Inc. and Related Matters, etc.*, Case Nos. 15-218-GA-GCR et al., Opinion and Order at (September 7, 2016) (“Staff impartially represents the interests of all stakeholders, including residential customers”).

²¹ *In the Matter of the Application of Ohio Power Company for Approval of an Advanced Meter Opt-Out Service Tariff*, Case No. 14-1158-EL-ATA, Opinion and Order at 7 (April 27, 2016).

ripple effect for all other certification proceedings (and the litigation and discovery that follows). There can be no doubt that OCC's intervention will unduly delay this proceeding and prejudice XOOM Energy.

IV. Conclusion

OCC has not met the requirements for intervention because, first and foremost, OCC does not have the requisite statutory authority to intervene and represent residential consumers in this proceeding. OCC also has no valid interest *in this proceeding*. Even if OCC has an interest (which it does not), OCC's interest will be adequately represented by Staff, which has reviewed and addressed applications for certification for decades. Finally, OCC will not contribute to a just and expeditious resolution of the issues involved because its intervention would result in an undue delay and undue prejudice to XOOM Energy. OCC's intervention motion should be denied.

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio’s e-filing system will electronically serve notice of the filing of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail this 24th day of August, 2022.

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/s/ Gretchen L. Petrucci

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Summary: Memorandum Contra to the Office of the Ohio Consumers' Counsel's
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XOOM Energy Ohio, LLC